TJIA SWAN NIO

v.

NG NYUK MOI & ORS.

HIGH COURT BORNEO, KUCHING
RICHARD MALANJUM JC
[SUIT NO. KG 190 OF 1981]
15 SEPTEMBER 1992

CONTRACT: *Purchase of land by plaintiff under a sale and purchase agreement - Whether there was any misrepresentataion by defendant which induced plaintiff to sign the sale and purchase agreement - Status of occupiers on the purchased land.*

WORDS AND PHRASES: *Meaning of "tenants" and "squatters".*

The plaintiff alleged that she was induced to sign the sale and purchase agreement as a result of a representation to her by the defendants that the occupiers on the land which she had purchased were tenants and not squatters.

Therefore she claimed:

(i) damages for fraud/misrepresentation and breach of condition together with interest

(ii) refund of the deposit with interest; and

(iii) costs.

However, Clause 5 of the sale and purchase agreement read:

> 5. It is expressly agreed that the vendors shall not be responsible for removing and vacating the squatters from the said land.

The learned Judge considered the following issues before him:

1. whether there were occupiers on the said land on or before the signing of the said agreement;
2. the status of the occupiers of the subject land, if any, on or before the said agreement was signed;
3. if the occupiers were in facts tenants whether there was representation by the defendants to the plaintiff; and
4. if so, whether such representation was fraudulent or reckless or mere representation.

On the first issue it was found that on the balance of probabilities that there were people occupying the subject land on or before the signing of the said agreement.

Held:

[1] On a balance of probabilities the evidence showed the occupiers of the land were squatters and not tenants or licencees of the defendants.

[2] There was no evidence at all to prove that:

(i) rentals were paid to the defendants;

(ii) that there was any kind of legal relationship between the occupier and the defendants;

(iii) that the occupier had exclusive possession of the subject land;

(iv) that the occupier had a term certain of his occupation of the subject land;

(v) that express or implied permission was given to the occupier to occupy the subject land;

(vi) that the occupier had the personal privilege to be on the subject land; and

(vii) that the defendants had acted in acquiescence in the physical fact of the occupiers occupation of the subject land.

[3] There was also no misrepresentation made by the defendants to the plaintiff as the insertion of the word "squatters" in the said agreement was done upon agreement of both parties' solicitors.

Legislation referred to:
Land Code (Cap 81) Sarawak, s. 131

Cases referred to:
Mc Phail v. Persons Unknown [1973] 1 Cl 447
Sidek Bin Hj. Muhamad & Ors. v. Government of Perak [1982] 1 MLJ 313
Goh Gin Chye & Anor v. Peck Teck Kian Realty Pte. Ltd & Anor [1987] 2 MLJ 118
Street v. Montford [1985] 1 AC 809
Yeap Cheong Hock v. Yang Yong Hoo [1979] 1 MLJ 131
Jamir Hassan Bin Najar Hassan v. Kang Min [1991] 2 CLJ (Rep) 773
Ashmore v. Corporation of Lloyds [1992] 1 WLR 446

For the plaintiff - Joseph Lim; M/s. Loa & Lim Advocates, Kuching
For the defendants - Perpetua Phang; M/s. Reddi & Company, Kuching

JUDGMENT

Richard Malanjum JC:

This is an action by the plaintiff against the defendants in connection with an agreement dated 9 November 1976 (hereinafter called "the said agreement" and admitted as Exh. P2) relating to the sale and purchase of a parcel of land described as Lot 21 Section 39 Kuching Town Land District together with the benefit of right of access over the land described as Parcel 15 Section 39 Kuching Town Land District (hereinafter called "the subject land"). Originally there were several claims of the plaintiff but on the outset of the hearing of this action and in his final submissions the learned Counsel for the plaintiff abandoned claims (1), (4) and (5) and only maintained claims (2), (3) and (6) as contained in the statement of claim dated 20 April 1981 and filed herein and as amended on 28 July 1992, namely,

(i) damages for fraud/misrepresentation and breach of condition together with interest;

(ii) refund of deposit with interest; and

(iii) costs.

Since the source of the dispute arose from the said agreement (Exh. P2) it may be appropriate to reproduce the relevant provisions of the said agreement.

Clause 3 reads:

> 3. The date of settlement shall be on or before 9 February 1977, at which date the Purchaser and/or her nominees shall be entitled to:
>
> (a) a transfer of the said land free from all encumbrances; and
>
> (b) possession of the said land subject to squatter's occupation thereon.

Clause 4 reads:

> 4. Time wherever specified shall be the essence of this contract.

Clause 5 reads:

> 5. It is expressly agreed that the Vendors shall not be responsible for removing and vacating the squatters from the said land. (*SIC*)

The purchase price of the subject land was RM28,000 with the payment of RM8,000 as deposit on the signing of the said agreement and the balance to be settled on or before 9 February 1977. Clause 7 of the said agreement also provides for the right of the vendors (in this case the defendants) to forfeit the deposit paid upon failure of the purchaser (in this case the plaintiff) to pay the balance of the purchase price before 9 February 1977 or due to the purchaser's unwillingness or inability to proceed with the transaction.

The main complaint of the plaintiff in this action is that she says that she was induced to sign the said agreement (Exh. P2) as a result of the representation made to her by the defendants as to the status of the occupiers of the subject land at the material time. The plaintiff alleges fraudulent or reckless representation or misrepresentation on the part of the defendants in the transaction. It is the contention of the plaintiff that the occupiers on the subject land at the material time (that is on or before the said agreement was signed) were tenants of the defendants and not squatters as represented to her and as stated in the said agreement. The defendants deny this and stated, *inter alia*, in their defence that only Lot 15, Section 19 was occupied.

As such it is important for this Court to determine if there have been sufficient evidence adduced to indicate the status of the occupiers at the material time and to conclude on the balance of probabilities that the occupiers were tenants. If the occupiers were not tenants or that they were not occupying the subject land then the action of the plaintiff must be dismissed as the question of whether or not there was representation becomes irrelevant. I shall therefore proceed to consider the issues namely:

1. whether there were occupiers on the said land on or before the signing of the said agreement (Exh. P2);
2. the status of the occupiers of the subject land, if any, on or before the said agreement was signed;
3. if the occupiers were in fact tenants, whether there was representation by the defendants to the plaintiff; and
4. if so, whether such representation was fraudulent or reckless or mere misrepresentation.

1. ***Whether there were occupiers on the subject land.***

Having considered the evidence of PW1 - Poh Boon Hock, PW2 - the plaintiff, PW4 - Poh Eng Soon and the 2nd defendant (DW1) - Ng Lik Chew, it is my finding on the balance of probabilities that there were people occupying the subject land namely PW1 - Poh Boon Hock and his family on or before the signing of the said agreement (Exh. P2). The only difference between the plaintiff's version and the defendants' version is the degree of occupation. It is the plaintiff's contention that the wooden house of the occupiers was on the subject land with a small portion on another lot whereas the 2nd defendant denies this and says that the subject land was only used for rearing chicken. Be that as it may I do not think the degree of the usage of the subject land is very crucial in determining the dispute between the parties hereto. The important factor to consider is whether such an occupation,

regardless of the degree in the occupation of the subject land, is one of tenancy or otherwise. It is to be noted here that although the 2nd defendant asserted that only the eaves of the wooden house was on the subject land and that he had the subject land surveyed, he did not adduce any evidence to support his assertion. He could have produced the survey plan as he paid RM200 for it. No explanation was given other than that he had lost the receipt for the payment of the RM200.

Further, from the said agreement itself (Exh. P2) which was also signed by the 2nd defendant, it can be inferred in Clauses 3 and 5 that there is an acknowledgment of the presence of occupier or occupiers on the subject land otherwise there is no reason for such a specific issue as 'squatters' to be added in the said agreement (Exh. P2).

2. ***The status of the occupiers of the subject land.***

The plaintiff alleges that the occupiers were tenants and not squatters on and before the signing of the said agreement (Exh. P2). The defendants say that the occupiers were not their tenants and they had nothing to do with them. Meanwhile, the said agreement (Exh. P2) makes references to "squatter's occupation" on the subject land. Evidence from both sides have been adduced to support their respective contentions. However, in my view before any finding can be made on the status of the occupiers, it is necessary to examine the judicial interpretation and decisions of the terms 'squatters' and 'tenants'.

In the case of *McPhail v. Persons Unknown* [1973] 1 Ch 447 Lord Denning MR stated thus at p. 456:

> What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law.

It was also held in *Sidek bin Hj. Muhamad & Ors. v. Government of Perak* [1982] 1 MLJ 313 that squatters have no right either in law or in equity and it does not lie in their mouths to assert that they used and occupied the land as squatters.

However, although squatters or trespassers continue to be trespassers so long as they remain on the affected land or building, they may gain possession if the rightful owner of the affected land does something like acquiescence in the physical fact of the trespassers' occupation of the affected land. [See: *McPhail's* case *(supra)*].

As for the question of who is a tenant, reference may be made to the case of *Goh Gin Chye & Anor. v. Peck Teck Kian Realty Pte. Ltd. & Anor.* [1987] 2 MLJ 118, (Singapore Court of Appeal) where Thean J outlined the main requirements of a tenancy as follows: p. 122.

> ... First, the intention of the parties is an important consideration in determining the relationship of landlord and tenant, as in all other contractual relationships, but in every case the intention "must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances." What the parties said or professed in the agreement alone is not enough, it does not alter what is, in effect, a tenancy into a licence, and *vice versa*. Secondly, the relationship of the parties is determined by law, having regard to all the relevant circumstances, and not by the label they choose to put on the agreement. The "consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence." Thirdly, a material circumstance in the consideration of the relationship of landlord and tenant is exclusive

> possession of the property enjoyed by the occupier and exclusive possession is an essential requirement of a tenancy ... Lastly, exclusive possession is also not the sole and only criterion; these may be circumstances negativing an intention to create a tenancy. Such circumstances are numerous.

In the case of *Street v. Mountford* [1985] 1 AC 809 Lord Templeman in his speech discussed and examined the issues of tenancy and licence. At p. 816 his Lordship stated:

> ... there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession.

Further down, at p. 818, his Lordship continued:

> There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. **To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.** The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.
>
> (Emphasis added)

And finally, at p. 825, his Lordship stated the distinction between a contractual tenancy and a contractual licence when he said:

> ... If **exclusive possession at a rent for a term** does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable.
>
> (Emphasis added)

From the above it is clear that the hallmarks of a contractual tenancy as distinguised from a contractual licence are (a) exclusive occupation; (b) payment of rent; and (c) for a periodical term.

A question may be asked as to who is a licensee? His Lordship Syed Agil Barakbah J (as he then was) in the case of *Yeap Cheong Hock v. Kajima-Taisei Joint Venture* [1973] 1 MLJ 230 at p. 232 answered that question as thus:

> At common law a licensee is one who is lawfully on the premises, in the sense that he is not a trespasser, but does not come within the description of an invited because he does not enter on business which concerns the occupier. He is there with the permission of the occupier given as a matter of business. "Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the worldly advantage which the host may remotely have in view".

In the case of *Woo Yew Chee v. Yang Yong Hoo* [1979] 1 MLJ 131 it was stated that the test to be applied in determining whether a transaction is a licence or a tenancy is the "nature and quality of the occupancy, whether it is intended that the occupier should have a stake in the premises sub-let or whether he should have only a personal privilege".

Bearing in mind the principles of law stated above I now turn to the evidence adduced in this trial if the necessary requirements have been satisfied.

The plaintiff says that the occupiers on the subject land were tenants. To substantiate her allegation she called two of the occupiers, namely, PW1, Poh Boon Hock and PW4, Poh Eng Soon.

According to PW1, Poh Boon Hock, his family had been on the subject land even before his father passed away in 1949. He said that his father handed over the wooden house to him and he continued to live there until April 1992. He moved out at the request of the new owner, Mr. Yap Han Boon (DW2) on being paid the sum of RM8,000 as a condition to move out. This witness was shown with his own statutory declaration affirmed on 26 August 1980 (Exh. P1) and he confirmed the contents were correct. PW1 also said that he knew there was a change of ownership of the subject land to the 2nd defendant, Ng Lik Chew. But this witness was not asked on payment of rentals to the owners of the land. It is only stated in Exh. P1 para. 6 that he (PW1) "continued to pay the present owners rental by sending the same *via* registered post but on each occasion the rental was refunded to me".

It is to be observed here that other than the bare claim by PW1 in Exh. P1 on the payment of rental there was no supporting documentary proof annexed to Exh. P1. It is also to be noted that according to PW1, Exh. P1 was prepared by one Loa Djin Liang a lawyer who is the son of the plaintiff. This witness, PW1, did not state whether he had the exclusive possession of the subject land or whether he had any kind of legal relationship with the then owners, the defendants. There was also no evidence adduced from this witness that he could have resisted any attempts to evict him from the subject land before he moved out in April 1992.

As for the evidence of PW4, Poh Eng Soon he testified that his family was the occupier of the subject land up to 25 April 1992 and that he grew up in the wooden house and only left in 1976 when he got married. He also testified that his family's occupation of the subject land resulted in letters from a legal firm on the instruction of the 2nd defendant being sent to them. His family instructed the legal firm of M/s. Loke King to reply and thereafter there was no development. This witness also said under cross-examination that his family paid rental of RM4 to the 2nd defendant but it was refused. The mode of payment was described by this witness as payment made by his mother to the legal firm of M/s. Loke King. However after a few times the said legal firm told his family not to pay anymore as the 2nd defendant refused to accept the rental. PW4 also could not confirm if the defendants ever received rental from his family.

From the testimony of PW4 few points need to be noted. Firstly, his evidence on the mode of the alleged payment of rental contradicted the evidence of PW1 in Exh. P1. Secondly, there appears to be the refusal of the 2nd defendant being one of the owners of the subject land to have anything to do with PW4 and his family. In other words, there was a refusal by the 2nd defendant to have any legal relationship with the occupiers. Thirdly, there is no confirmation that rentals were received by the defendants. Fourty, there is nothing in the evidence of PW4 that his family had the exclusive use or possession of the subject land. But the occupation of the subject land had been for a long period.

In view of the long period of occupation of the subject land by PW1 and his family including PW4, it is necessary to examine this issue in relation to the defendant. The 2nd defendant gave evidence that he bought the subject land in 1973. From the copy of the document of title which is on p. 6 of the Agreed Bundle of Documents marked "A" it is also clear that the 2nd defendant together with the 1st defendant and one Ng Siew Ching had the subject land transferred to them on 11 January 1973.

Ng Siew Ching later on transferred her share to the 3rd defendant on 21 August 1975. According to the 2nd defendant he never received any rental on account of the subject land. He also said that as far as he knew the other defendants also never received any rental. This evidence is consistent with the evidence of PW4. From the evidence of the 2nd

defendant it is also apparent that he could enter the subject land anytime without getting any permission from anyone including PW1 and that he had been attempting to sell the subject land for quite sometime. He also said that he never requested PW1 to pay the rate to the Kuching Municipal Council in respect of the subject land and in fact when he received the bill after 1985 he paid for the bill to the Council. The 2nd defendant testified that he paid the quit rent of the subject land to the Lands & Surveys Department. The 2nd defendant also said that as he observed that the wooden house of PW1 was not totally on the subject land he did not ask PW1 to leave. He only told PW1 not to occupy any portion of the subject land. To this request the 2nd defendant said that PW1 asked for compensation to remove the chicken sheds and the construction of another access road. The 2nd defendant said that he did not agree to pay the compensation. When put to him under cross-examination that he did not do anything as he agreed to the occupation of the subject land, the 2nd defendant disagreed.

After due consideration of the evidence of PW1, PW4 and the 2nd defendant and the submission of learned Counsels for the plaintiff and defendants, in particular on the contention of the learned Counsel for the plaintiff that the occupiers of the subject land were tenants, it is my finding on the balance of probabilities that PW1 and his family were not tenants of the defendants or licensees on the subject land at the material time. I am not satisfied on the balance of probabilities that (i) rentals were paid to the defendants; (ii) that there was any kind of legal relationship between PW1 and the defendants; (iii) that PW1 had exclusive possession of the subject land; (iv) that PW1 had a term certain of his occupation of the subject land; (v) that PW1 had the permission expressed or implied from any of the defendants to occupy the subject land; (vi) that PW1 had the personal privilege to be on the subject land; and (vii) that the defendants had done something like acquiescence in the physical fact of PW1's occupation of the subject land. In fact on the issue of acquiescence the defendants especially the 2nd defendant had done which rebutted any evidence of acquiescence such as he requested PW1 not to occupy the subject land, that rental payments were refused and that he entered into the subject land with the view to survey or to bring prospective buyers frequently without any objection from PW1. It is also to be noted that s. 131 of the Sarawak Land Code does not recognise adverse possession. [See: *Jamir Hassan bin Najir Hassan v. Kang Min* [1991] 2 CLJ (Rep) 773].

In view of my finding above the issue of whether there was misrepresentation becomes unnecessary. Even if there was representation such representation could not be misleading in view of my finding on the status of the occupiers of the subject land.

3. ***Whether there was any misrepresentation made.***

Nevertheless, even if I am wrong on the finding as to the status of the occupiers of the subject land at the material time, it is also my finding on the balance of probabilities having considered the evidence adduced that there was no misrepresentation made by the defendants to the plaintiff. Indeed, the plaintiff in her evidence, especially under cross-examination and re-examination, stated that it was her son, Lao Djin Liang who handled the transaction on her behalf. She confirmed that she met the 2nd defendant for the first time at the office of M/s. Y.O. Leong where she signed the said agreement (Exh. P2). During that meeting there was no discussion about squatters on the subject land. The 2nd defendant only told her of the presence of a wooden house on the subject land.

It is also submitted by learned Counsel for the plaintiff that the misrepresentation itself is on Exh. P2 (the said agreement) as the word 'squatters' is used when it is not true. This argument has no merit in view of my finding on the status of the occupiers. However, even if I am

wrong in my finding, such argument appears to ignore the fact that it was the son of the plaintiff that arranged for the preparation of Exh. P2. The plaintiff only met the 2nd defendant on the day of signing of Exh. P2 when all were prepared. The question that cries for an answer is this: how did the terms in Exh. P2 come about if the plaintiff never had discussion with the 2nd defendant before that day? Perhaps the son of the plaintiff could have cleared the issue but he was not called to testify. Could it be that the word 'squatters' was used by the son and/or the solicitor who prepared Exh. P2 without any verification from the 2nd Defendant? It is to be noted that the 2nd defendant does not speak or write English and no evidence was adduced by the plaintiff that Exh. P2 was explained to the 2nd defendant before he signed it or for that matter no evidence was adduced that the other defendants were aware of the contents of Exh. P2. No doubt a person is bound by what he signed unless he pleads otherwise. However, it would have made much easier the task of the Court if evidence was adduced on this issue. As it stands I am very much in doubt if the word 'squatters' as found in Exh. P2 was used as a result of a representation made by any of the defendants to the plaintiff.

4. ***Conclusion:***

Accordingly, in view of my findings stated above, the plaintiff has not proved her case and her action therefore fails and is hereby dismissed with costs.

Finally, it is my hope that in future Counsels before coming for trials will consider the relevant issues of their cases and to submit the relevant authorities on those issues instead of relying on their own views and in dictionary definitions. It is the duty of Counsel to assist the Court not only on the facts of the case but also on the law so that justice may be attained! It is the duty of Counsel to assist the Court by simplification and concentration and not to "advance a multitude of ingenious arguments in the hope that out of 10 bad points the Judge will be capable of fashioning a winner". [See: *Ashmore v. Corporation of Lloyd's* [1992] 1 WLR 446].

Also found at [1992] 4 CLJ 2200